Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCvC-279–06 OF 2014
QUAY CHEW SOON JC
29 MARCH 2021

Evidence — Admissibility — Relevance — Evidence relating to facts in issue — Whether bank statements were relevant — Previous proceeding — Former High Court judge had decided that the bank statements were not relevant or necessary — Whether res judicata applies

Evidence — Privilege — Legal professional privilege — Whether bank statements were covered by solicitor-client privilege — Whether the probative value outweighs its prejudicial effect — Whether Personal Data Protection Act was applicable — Evidence Act 1950 s 126

This was the plaintiff's application to admit bank statements of the second defendant as evidence at the trial. The second defendant was a firm of solicitors. The third defendant was an advocate and solicitor and was the managing partner of the second defendant. During the trial, the plaintiff sought to admit certain documents ('the subject documents') as evidence. The subject documents consisted of: (a) the bank statements pertaining to the office account and the client account of the second defendant for the period from December 2010–February 2012 ('the relevant period'); (b) the account opening form and supporting documents pertaining to the opening of the office account and the client account of the second defendant; and (c) two letters from CIMB Bank to Jabatan Siasatan Jenayah Komersil, Polis Diraja Malaysia enclosing the subject documents. The defendants objected to the subject documents being admitted as evidence at the trial. The plaintiff was interested to purchase a piece of land ('the said land') which was introduced by the third defendant. The third defendant allegedly informed the plaintiff that the land deal had to be done through a company which he controlled, the first defendant, via a back to back transaction on two separate sale and purchase agreements. The first one was the agreement ('back to back SPA') between the first defendant and the owners of the said land and the other agreement would be between the first defendant and the plaintiff. The plaintiff paid a total deposit of RM9,056,124 to the second defendant pending the execution of the sale and purchase agreement between the plaintiff and the first defendant. A sale and purchase agreement was entered into between the plaintiff and the first defendant in relation to the purchase of the said land. The first defendant never

signed a back to back SPA with the land owners. The plaintiff alleged that the land owners had never agreed to sell the land in the first place. The plaintiff claimed for the refund of the deposit sum and damages against the defendants based on fraudulent misrepresentation relating to the non-existing land deal, breach of stakeholder's duties, breach of trust, breach of fiduciary duty, breach of duty in negligence and contract and conspiracy to defraud and injure the plaintiff. The plaintiff sought to produce at trial, the bank statements which showed that the second defendant banked a total sum of RM3,570,374.22 out of the deposit sum, into its office account instead of its client account. The plaintiff filed an application against the first, second and third defendants for discovery of the bank statements. The discovery application was dismissed. On 28 September 2017, the plaintiff's solicitor wrote to request for the exhibits including the bank statements which had been tendered as evidence from the sessions court where the third defendant was charged for cheating and criminal breach of trust arising from the same land transaction. The request was acceded to and the bank statements were provided by the sessions court to the plaintiff's solicitors. After obtaining the bank statements from the sessions court, the plaintiff filed the bank statements into the High Court for the purpose of the trial of the present suit. The second and third defendants argued that the bank statements were inadmissible as they were irrelevant, and contained privileged information relating to the client account of the second defendant. The second and third defendant further argued that the disclosure of the bank statements was an offence under the Personal Data Protection Act 2010 ('the PDPA'). The second and third defendant further contended that the plaintiff was estopped from attempting to tender the bank statements as it was barred by res judicata.

Held, allowing the plaintiff's application:

(1) The court found that the bank statements were relevant for the determination of the facts in issue. The plaintiff's pleaded case against the defendants was not solely based on a breach of the SPA on the ground of fraudulent misrepresentation. The plaintiff had further pleaded conspiracy to defraud, and the plaintiff's case was also based on breach of stakeholder's duties, breach of trust, breach of fiduciary duty, breach of duty in negligence and/or contract. The bank statements were relevant to ascertain the whereabouts of the deposit monies. The timing and the identity of the parties to whom the second defendant had released the deposit monies would be relevant to determine whether the second and third defendants had breached their alleged duties as stakeholders and whether the first and fourth defendants allegedly conspired with and/or assisted the second and third defendants in breach of their fiduciary duties and/or to defraud the plaintiff. The bank statements, which show the flow of payment of the deposit monies, were therefore relevant to address the issues to be tried (see paras 21–22, 28–29 & 31).

(2) The bank statements were not covered by solicitor-client privilege as they were the second defendant's own internal documents. The bank statements did not constitute communications exchanged between the second defendant and its client for the purpose of seeking legal advice. Nor did they constitute advice given by the second defendant to its clients. They were internal records maintained, in part at any rate, in discharge of the second defendant's obligations under the Solicitors' Account Rules 1990. The bank statements were essentially ledger entries showing the payments in and payments out from the office account and client account of the second defendant. The bank statements did not contain any advice or confidential information exchanged between the second defendant and its clients. The banks statements would not be treated as a solicitor-client communication or a document which contained any privileged information as envisaged or protected by s 126 of the Evidence Act 1950. The banks statements were not protected by legal professional privilege (see paras 37, 39 & 41).

(3) Firstly, the PDPA did not apply in respect of the data of the first defendant, since the first defendant was the subject of the data in question. Since the first defendant was not an individual but was a corporate entity, the PDPA did not apply with respect to the first defendant. Secondly, the 'data subject', ie the clients of the second defendant, were not identified nor were they identifiable from the ledger entries or information contained in the bank statements. For that reason, the PDPA did not apply with respect to the other clients of the second defendant who were individuals. Thirdly, even if the learned judicial commissioner was wrong in reaching the aforesaid conclusions, the disclosure of the bank statements was permitted under the PDPA itself. Pursuant to s 6(2) of the PDPA, personal data might be processed if the processing was necessary for compliance with any legal obligation to which the data user was subject or for the administration of justice. Where the court made a ruling that the documents in question were relevant and admissible, a party could not use the PDPA as a shield to prevent the said documents from being produced at the trial under the guise of personal data protection. Making available the bank statements as evidence in the trial would be permitted under the PDPA as it was necessary for the administration of justice. It would be against the interests of justice if the bank statements were prevented from being admitted as evidence at the trial due to reasons of personal data protection. In any event, the exemption in s 45(2)(d) of the PDPA clearly permitted disclosure of documents that was necessary pursuant to a court order or judgment. As such, the disclosure of the bank statements was permitted given that they were relevant and admissible (see paras 43–44, 46–47, 50 & 56–58).

(4) With respect to the decision of the High Court in the case of *How Chee*

Hong v Chong Joo Tian & Ors [2019] MLJU 437 ('OS 26'), the court found that it was distinguishable from the present case the bank statements were not covered by solicitor-client privilege. In OS 26, the documents in question were not confined to the bank statements only and the plaintiff in the present case was not a party to the originating summons. Res judicata did not apply against one who was not a party in prior proceedings which resulted in a final judgment. Since the plaintiff's director was denied an opportunity to intervene to put forward his case as to whether the bank statements were protected by solicitor-client privilege, res judicata did not operate to shut out the plaintiff from litigating the issue. Res judicata was a doctrine of substantial justice. Since it was designed to achieve justice, the court might decline to apply it where to do so would lead to an unjust result. Here, the court opined that the justice of the instant case laid in favour of admissibility of the bank statements on the footing that they were not covered by legal professional privilege (see paras 69–71 & 73–75).

(5) It was clear that the former High Court judge was not dealing with the question of the relevancy and admissibility of the bank statements under the Evidence Act 1950 in the context of a trial. Contrariwise, the court was tasked to determine the admissibility of the bank statements at the trial pursuant to the consent order. It followed that the decision of the former high court judge could not be res judicata for the purposes of determining the question as to whether the bank statements were relevant and admissible in a trial pursuant to the Evidence Act. It was a matter that must be determined at the trial by the trial judge (see paras 80–81).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk memasukkan penyata bank defendan kedua sebagai keterangan semasa perbicaraan. Defendan kedua adalah firma guaman. Defendan ketiga adalah peguambela dan peguamcara dan adalah rakan urusan defendan kedua. Semasa perbicaraan, plaintif memohon untuk memasukkan dokumen tertentu ('dokumen tersebut') sebagai keterangan. Dokumen tersebut terdiri daripada: (a) penyata bank berkaitan akaun pejabat dan akaun anak guam defendan kedua untuk tempoh dari Disember 2010–Februari 2021 ('tempoh berkaitan'); (b) borang buka akaun dan dokumen sokongan berkaitan buka akaun pejabat dan akaun anak guam defendan kedua; dan (c) dua surat daripada CIMB Bank kepada Jabatan Siasatan Jenayah Komersil, Polis Diraja Malaysia yang melampirkan dokumen tersebut. Defendan-defendan membantah kepada dokumen tersebut diterima sebagai keterangan semasa perbicaraan. Plaintif berminat untuk memberi sebidang tanah ('tanah tersebut') yang diperkenalkan oleh defendan ketiga. Defendan ketiga didakwa telah memberitahu plaintif bahawa urusan tanah tersebut perlu dilakukan melalui syarikat yang dikawal olehnya, iaitu defendan

A pertama, melalui transaksi berterusan berhubung dua perjanjian jual beli yang berasingan. Perjanjian yang pertama adalah perjanjian ('perjanjian berterusan') antara defendan pertama dan pemilik tanah untuk tanah tersebut dan perjanjian satu lagi adalah antara defendan pertama dan plaintif. Paintif telah membayar sejumlah RM9,056,124 kepada defendan kedua sementara menunggu pelaksanaan perjanjian jual beli antara plaintif dan defendan pertama. Perjanjian jual beli telah dimasuki antara plaintif dan defendan pertama berkenaan pembelian tanah tersebut. Defendan pertama tidak menandatangani PJB berterusan tersebut dengan pemilik tanah. Plaintif mendakwa bahawa pemilik tanah tidak pernah bersetuju untuk menjual tanah tersebut pada asalnya. Plaintif menuntut bayaran balik jumlah deposit dan ganti rugi terhadap defendan-defendan berdasarkan penipuan salah nyata berkaitan urusan tanah yang tidak wujud, pelanggaran kewajipan pemegang taruh, pelanggaran amanah, pelanggaran kewajipan fidusiari, pelanggaran kewajipan dalm kecuaian dan kontrak dan konspirasi untuk menipu dan menjejaskan plaintif. Plaintif memohon untuk mengemukakan semasa perbicaraan, penyata bank yang menunjukkan bahawa defendan kedua telah memasukkan ke dalam bank sejumlah RM3,570,374.22 daripada jumlah deposit, ke dalam akaun pejabatnya dan bukan kaun anak guamnya. Plaintif telah memfailkan permohonan terhadap defendan-defendan pertama, kedua dan ketiga untuk penemuan penyata bank tersebut. Permohonan penemuan tersebut telah ditolak. Pada 28 September 2017, peguam plaintif telah menulis untuk meminta ekshibit itu termasuk penyata bank tersebut yang telah ditenderkan sebagai keterangan dari mahkamah sesyen di mana defendan ketiga telah didakwa kerana menipu dan jenayah pecah amanah yang timbul daripada transaksi tanah yang sama. Permintaan itu dipersetujui dan penyata bank tersebut telah dikemukakan oeh mahkamah sesyen kepada peguam plaintif. Setelah memperoleh penyata bank tersebut dari mahkamah sesyen, plaintif telah memfailkan penyata bank tersebut ke Mahkamah Tinggi bagi tujuan perbicaraan saman ini. Defendan-defendan kedua dan ketiga berhujah bahawa penyata bank tersebut tidak boleh diterima masuk kerana ia adalah tidak relevan, dan mengandungi maklumat yang dilindungi berkaitan akaun anak guam defendan kedua. Defendan-defendan kedua dan ketiga selanjutnya berhujah bahawa pendedahan penyata bank tersebut merupakan satu kesalahan di bawah Akta Perlindungan Data Peribadi 2010 ('APDP'). Defendan-defendan kedua dan ketiga selanjutnya menegaskan bahawa plaintif telah diestopkan daripada cuba menenderkan penyata bank tersebut kerana ia telah dihalang oleh res judicata.

Diputuskan, membenarkan pemohonan plaintif:

(1) Mahkamah mendapati bahawa penyata bank tersebut adalah relevan untuk penentuan fakta yang menjadi isu. Kes yang dipli oleh plaintif terhadap defendan-defendan bukan semata-mata berdasarkan pelanggaran PJB atas alasan penipuan salah nyata. Plaintif selanjutnya

mempli konspirasi untuk menipu, dan kes plaintif juga berdasarkan pelanggarah kewajipan pemegang taruh, pelanggaran amanah, pelanggarah kewajipan fidusiari, pelanggaran kewajipan dalam kecuaian dan/atau kontrak. Penyata bank tersebut adalah relevan untuk menentukan di mana wang deposit itu. Masa dan identiti pihak-pihak yang mana defendan kedua telah mengeluarkan wang deposit itu adalah relevan untuk menentukan sama ada defendan-defendan kedua dan ketiga telah melanggar kewajipan mereka yang dikatakan sebagai pemegang taruh dan sama ada defendan-defendan pertama dan keempat dikatakan berkonspirasi dengan dan/atau membantu defendan-defendan kedua dan ketiga dalam pelanggaran kewajipan fidusiari mereka dan/atau untuk menipu plaintif. Penyata bank tersebut, yang menunjukkan aliran bayaran wang deposit itu, adalah dengan itu relevan untuk menangani isu-isu yang akan dibicarakan (lihat perenggan 21–22, 28–29 & 31).

(2) Penyata bank tersebut tidak dilindungi oleh perlindungan peguam-anak guam kerana ia adalah dokumen dalaman defendan kedua sendiri. Penyata bank tersebut tidak merupakan pertukaran komunikasi antara defendan kedua dan anak guamnya bagi tujuan meminta naihat guaman. Juga ia tidak merupakan nasihat yang diberikan oleh defendan kedua kepada anak guamnya. Ia merupakan rekod dalaman yang disimpan, sebahagiannya pada kadar apa pun, dalam pelaksanaan tanggungjawab defendan kedua di bawah Kaedah-Kaedah Akaun Peguam 1990. Penyata bank tersebut adalah pada dasarnya entri lejar menunjukkan bayaran masuk dan bayaran keluar dari akaun pejabat dan akaun anak guam defendan kedua. Penyata bank tersebut tidak mengandungi apa-apa nasihat atau maklumat sulit yang bertukar antara defendan kedua dan anak guamnya. Penyata bank tersebut tidak dianggap sebagai komunikasi peguam-anak guam atau dokumen yang mengandungi apa-apa maklumat yang dilindungi sebagaimana termaktub atau dilindungi oleh s 126 Akta Keterangan 1950. Penyata bank tersebut tidak dilindungi oleh perlindungan profesional undang-undnag (lihat perenggan 37, 39 & 41).

(3) Pertama, APDP tersebut tidak terpakai berkenaan dengan data defendan pertama, oleh kerana defendan pertama tertakluk kepada data yang dipersoalkan. Oleh kerana defendan pertama bukan seorang individu tetapi entiti korporat, APDP tersebut tidak terpakai berkenaan defendan pertama. Keduanya, 'data subject', iaitu anak guam defendan kedua, tidak dikenalpasti atau mereka dikenalpasti dari entri lejar atau maklumat yang terkandung dalam penyata bank tersebut. Untuk tujuan itu, APDP tersebut tidak terpakai berkenaan dengan anak guam lain defendan kedua yang merupakan individu. Ketiga, meskipun pesuruhjaya kehakiman yang bijaksana terkhilaf alam mencapai kesimpulan di atas, pendedahan penyata bank dibenarkan di bawah

APDP itu sendiri. Menurut s 6(2) APDP, data peribadi mungkin diproses jika pemprosesan adalah perlu untuk pematuhan denga napa-apa obligasi perundangan yang mana pengguna data adalah tertakluk kepada atau untuk pentadbiran keadilan. Di mana mahkamah membuat keputusan bahawa dokumen yang dipersoalkan adalah relevan dan boleh diterima, satu pihak tidak boleh menggunakan APDP tersebut sebagai perlindungan untuk mengelakkan dokumen tersebut daripada dikemukakan semasa perbicaraan dengan alasan perlindungan data peribadi. Menyediakan penyata bank tersebut sebagai keterangan dalam perbicaraan adalah dibenarkan di bawah APDP kerana ia adalah perlu untuk pentadbiran keadilan. Adalah bertentangan dengan kepentingan keadilan jika penyata bank tersebut dihalang daripada diterima masuk sebagai keterangan dalam perbicaraan kerana alasan perlindungan data peribadi. Dalam keadaan apa pun, pengecualian dalam s 45(2)(d) APDP dengan jelas membenarkan pendedahan dokumen yang perlu menurut perintah atau keputusan mahkamah. Oleh itu, pendedahan penyata bank tersebut adalah dibenarkan kerana ia relevan dan boleh diterima (lihat perenggan 43–44, 46–47, 50 & 56–58).

(4) Sehubungan dengan keputusan Mahkamah Tinggi dalam kes *How Chee Hong v Chong Joo Tian & Ors* [2019] MLJU 437 ('OS 26'), mahkamah mendapati bahawa ia dapat dibezakan daripada kes ini di mana penyata bank tersebut tidak dilindungi oleh perlindungan peguam-anak guam. Dalam OS 26, dokumen yang dipersoalkan tidak hanya terbatas pada penyata bank tersebut dan plaintif dalam kes ini bukan merupakan pihak kepada saman pemula. Res judicata tidak terpakai terhadap seseorang yang bukan satu pihak dalam prosiding terdahulu yang menghasilkan penghakiman muktamad. Oleh kerana pengarah plaintif telah dinafikan peluang untuk mencelah bagi mengemukakan kesnya berhubung sama ada penyata bank tersebut adalah dilindungi oleh perlindungan peguam-anak guam, res judicata tidak beroperasi untuk menghalang palintif daripada membicarakan isu tersebut. Res judicata adalah doktrin keadilan substansial. Oleh kerana ia direka untuk mencapai keadilan, mahkamah mungkin menolak untuk mengguna pakainya di mana jika berbuat sedemikian akan membawa kepada keputusan yang tidak adil. Di sini, mahkamah berpendapat bahawa keadilan kes ini memihak kepada kebolehterimaan penyata bank tersebut berasaskan bahawa ia tidak dilindungi oleh hak istimewa professional undang-undang (lihat perenggan 69–71 & 73–75).

(5) Adalah jelas bahawa mantan hakim Mahkamah Tinggi tidak berurusan dengan persoalan penyata bank tersebut relevan dan boleh diterima masuk di bawah Akta Keterangan 1950 dalam konteks perbicaraan. Sebaliknya, mahkamah ditugaskan untuk menentukan kebolehterimaan penyata bank terebut semasa perbicaraan menurut perintah persetujuan. Ia diikuti bahawa keputusan mantan hakim Mahkamah Tinggi bukan

untuk res judicata bagi tujuan menentukan persoalan sama ada penyata bank tersbeut adalah relevan dan boleh diterima masuk dalam perbicaraan menurut Akta Keterangan 1950. Ia adalah satu perkara yang perlu ditentukan semasa perbicaraan oleh hakim perbicaraan (lihat perenggan 80–81).]

Cases referred to

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (folld)
Ernest Cheong Yong Yin v Kamariyah Hamdan & Ors [2015] 3 MLJevi 40; [2011] 10 CLJ 172, HC (refd)
Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals [2003] 4 MLJ 654, CA (refd)
How Chee Hong v Chong Joo Tian & Ors [2019] MLJU 437; [2019] 9 CLJ 383, HC (distd)
Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2016] 5 MLJ 127, CA (refd)

Legislation referred to

Evidence Act 1950 ss 5, 61, 126, 126(1), Chapter V
Personal Data Protection Act 2010 ss 4, 6(1), (2), 45(2)(d)
Rules of Court 2012 O 18 r 19, O 24, O 24 rr 5(2), 15, O 34 r 8, O 92 r 4
Solicitors' Account Rules 1990 rr 3, 4

Wong Hin Loong (Serena Lim Siew Ying with him) (Azman, Davidson & Co) for the plaintiff.
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Wong Hok Mun (Eng Kar Wei with him) (Azim, Tunku Farik & Wong) for the second and third defendants.

Quay Chew Soon JC:

INTRODUCTION

[1] This trial concerns only the first to fourth defendants (collectively the 'defendants') as the plaintiff's ('P') action against the fifth to 11th defendants had been struck out. After a full trial, I dismissed P's suit against the defendants. I delivered my decision and grounds of judgment on 15 January 2021. P filed an appeal against my judgment on 22 January 2021.

VOIR DIRE

[2] The second defendant ('D2') is a firm of solicitors. The third defendant ('D3') is an advocate and solicitor. D3 was at all material time the managing partner of D2. D2 and D3 are collectively referred to as 'D2 and D3'.

[3] During the trial, P sought to admit certain documents ('subject documents') as evidence. The subject documents consist of:

(i) the bank statements ('bank statements') pertaining to the office account No 1474–0000551–10–3 ('office account') and the client account No 1474–0000553–10–9 ('client account') of D2 for the period from December 2010 to February 2012 ('relevant period');

(ii) the account opening form and supporting documents pertaining to the opening of the office account and the client account of D2;

(iii) two letters from CIMB Bank Bhd to Jabatan Siasatan Jenayah Komersil, Polis DiRaja Malaysia, both dated 17 June 2015, enclosing (i) and (ii) above.

[4] D2 and D3 objected to the subject documents being admitted as evidence at the trial. The first defendant ('D1') and fourth defendant ('D4') likewise objected. D1 and D4 are collectively referred to as 'D1 and D4'.

[5] After a voir dire, I allowed P's application to admit the subject documents as evidence at the trial. D2 and D3 , being aggrieved with the said decision, filed an appeal to the Court of Appeal on 10 February 2021. D1 and D4 did not appeal against the said decision. These are the grounds for my decision.

LITIGATION HISTORY

[6] Vide a High Court order dated 29 October 2019, the learned High Court judge, Justice Dato' lndera Mohd Sofian bin Tan Sri Abd Razak (now JCA) ('subsequent HCJ') had dismissed two separate applications by D1 and D4 and D2 and D3 respectively to expunge the bank statements from the documents that P intends to rely on for the trial. The trial dates were fixed for August 2020.

[7] D1 and D4 made the application to expunge the bank statements pursuant to O 18 r 19 of the Rules of Court 2012 ('the RoC') and/or the inherent powers of the court under O 92 r 4 of the RoC ('encl 251').

[8] D2 and D3 made a separate application to expunge the bank statements pursuant to O 34 r 8 of the RoC and/or the inherent powers of the court under O 92 r 4 of the RoC ('encl 285').

[9] Both encls 251 and 285 were heard together and dismissed on 29 October 2019. The subsequent HCJ delivered his grounds of judgment dated 29 October 2019 in respect of the dismissal of encls 251 and 285.

[10] D1 and D4 filed an appeal to the Court of Appeal against the dismissal of encl 251.

[11] D2 and D3 did not appeal against the dismissal of encl 285. However on 21 July 2020, D2 and D3 filed a notice of motion at the Court of Appeal seeking leave to file a notice of appeal about 8 months out of time against the dismissal of encl 285. That notice of motion was fixed for case management at the Court of Appeal on 6 August 2020.

[12] D1 and D4's appeal to the Court of Appeal against the dismissal of encl 251 was fixed for hearing on 24 July 2020. At that hearing, both parties recorded a consent order on the following terms ('consent order'):

> The appeal is withdrawn on the following terms:
>
> (1) The documents in issue are to be classified as Part C documents;
>
> (2) The parties are at liberty to raise any and all issues without limitation with respect to the *admissibility of these documents at trial*; and
>
> (3) Costs of this appeal are in the cause to follow the event of the trial.

BACKGROUND FACTS

[13] P was interested to purchase a piece of land ('land') which was introduced by D3. D3 allegedly informed P that the land deal has to be done through a company which he controlled (ie, D1) via a back to back transaction. This means there would be two separate sale and purchase agreements. One agreement ('back-to-back SPA') would be between D1 and the owners of the land ('land owners'). And the other agreement would be between D1 and P.

[14] P paid a total deposit of RM9,056,124 ('deposit') to D2 pending the execution of the sale and purchase agreement between P and D1. A sale and purchase agreement dated 22 December 2011 was entered into between P and D1 in relation to the purchase of the land ('SPA'). However, eventually D1 never signed a back-to-back SPA with the land owners. P alleged that the land owners have never agreed to sell the land in the first place.

[15] P's claim in this action is for a refund of the deposit sum and damages against the defendants based on fraudulent misrepresentation relating to the non-existing land deal, breach of stakeholder's duties, breach of trust, breach of fiduciary duty, breach of duty in negligence and/or contract and conspiracy to defraud and injure P.

[16] P sought to produce at trial, the bank statements which shows that D2 has banked a total sum of RM3,570,374.22 ('paid sum'), out of the deposit

sum, into its office account instead of its client account. P contends that the bank statements are relevant to support its case, among others, for breach of trust by D2 and D3 and conspiracy among the defendants to defraud P over the non-existent land deal.

[17] On 14 January 2017, P filed an application at the High Court against D1, D2 and D3 for discovery of, inter alia, the bank statements ('discovery application'). The discovery application was heard and dismissed by a different learned High Court judge, Justice Nantha Balan (now JCA) ('former HCJ'), on 25 August 2017. Subsequently, P's appeal against this High Court order dated 25 August 2017 was dismissed by the Court of Appeal.

[18] On 28 September 2017, P's solicitors wrote to request for the exhibits (including the bank statements) which had been tendered as evidence from the Sessions Criminal Court 3 ('sessions court'). D3 was charged for cheating and criminal breach of trust arising from the same land transaction at the sessions court. This request was acceded to and the bank statements were provided by the sessions court to P's solicitors. D3 was acquitted by the sessions court, although the prosecution applied for a discharge not amounting to an acquittal.

[19] After obtaining the bank statements from the sessions court, P filed the bank statements into the High Court for the purposes of the trial of this suit.

OBJECTION TO ADMISSIBILITY OF THE BANK STATEMENTS

[20] D2 and D3 objected to the bank statements being admitted as evidence at the trial. Their contention that the bank statements ought not to be admitted as evidence is premised on the following arguments:

(a) the bank statements are irrelevant;

(b) the bank statements contained privileged information relating to the Client Account of D2. By admitting the bank statements as evidence, D2 will possibly face: (i) numerous claims on breach of solicitor-client privilege; and (ii) an offence under the Personal Data Protection Act 2010 ('the PDPA'). Therefore, the bank statements ought not to be admitted as its prejudicial effect far outweighs its probative value (if any); and

(c) the inclusion of the bank statements is barred by res judicata as the relevancy and necessity of the bank statements have already been determined.

RELEVANCY OF THE BANK STATEMENTS

[21] It is my finding that the bank statements are relevant for the determination of the facts in issue in the present case. I therefore allowed P's application to admit the bank statements as evidence at the trial.

[22] P's pleaded case against the defendants is not solely based on a breach of the SPA on the ground of fraudulent misrepresentation. P further pleaded conspiracy to defraud and injure against all the defendants. P's pleaded case against D2 and D3 is also based on breach of stakeholder's duties, breach of trust, breach of fiduciary duty, breach of duty in negligence and/or contract.

[23] It is not disputed that the deposit was indeed paid by P to D2. What is in dispute is whether the deposit was paid to D2 as stakeholder.

[24] P avers that the deposit was paid to D2 as stakeholder. It was paid based on representations made by D3 that: (i) the land owners had agreed to sell the land to D1; and (ii) D1 had entered into a back-to-back SPA with the land owners. The term of the stakeholding was that the deposit shall only be released when D1 has entered into a back-to-back SPA with the land owners.

[25] On the other hand, D2 and D3 avers that the deposit was never paid to D2 as stakeholder until D1 had entered into a back-to-back SPA with the land owners. According to D2 and D3, the deposit monies were to be released to D1 as and when it was paid by P to D2. As solicitors for D1 in relation to the SPA, D2 said that it received the deposit on behalf of D1.

[26] D1 and D4 jointly filed an amended statement of defence dated 15 October 2015. D2 and D3 jointly filed a statement of defence dated 21 July 2014. There appears to be a discrepancy between the pleadings of D1 and D4 and D2 and D3 in relation to the payment of the deposit monies.

[27] D1 pleaded that P paid the deposit monies to D1 (see para 2 of D1 and D4's defence). Whereas D2 did not expressly plead that it has paid the deposit monies to D1 but merely pleaded that all payments were forwarded in accordance with the instructions of D1 (see paras 31 of 47 of D2 and D3's defence).

[28] The bank statements, in my view, are relevant to ascertain the whereabouts of the deposit monies. The timing and the identity of the parties to whom D2 had released the deposit monies to would be relevant to determine whether D2 and D3 had breached their alleged duties as stakeholders. And whether D1 and D4 allegedly conspired with and/or assisted D2 and D3 in

breach of their fiduciary duties and/or to defraud P.

[29] The bank statements show that the paid sum (out of the deposit sum) was paid into D2's *office* account. P averred that D2 was holding the deposit in trust and therefore all thedeposit monies should have been banked into D2's *client* account. P referred to r 4 of the Solicitors' Account Rules 1990 which states that trust money should be paid into a client account. To my mind, the bank statements, which show the flow of payment of the deposit monies, are therefore relevant.

[30] The issues to be tried in the instant suit, inter alia, are as follows:

(a) whether D2 has released or applied the deposit monies for a purpose other than the purpose which D3 represented to P that D2 will hold the deposit for;

(b) whether D2 was holding the deposit paid by P as a stakeholder and/or trustee until such time that D1 had acquired legal rights of the land;

(c) whether D2 and D3 released the deposit monies with or without the knowledge and consent of P and whether such consent is necessary at all;

(d) whether D2 and D3 have committed a breach of trust with regard to the deposit; and

(e) whether the deposit was paid directly to D1 or elsewhere on the instructions of D1. And if the latter, what were the instructions and to whom were they released.

[31] I find that the bank statements are relevant to address the aforesaid issues to be tried. For that reason, I allowed the bank statements to be admitted as evidence in the trial.

LEGAL PROFESSIONAL PRIVILEGE

[32] D2 and D3 argued that the bank statements contained privileged information relating to the client account details of D2. This includes all of the clients of D2 who have transacted with D2's account during the relevant period. D2 and D3 contended that by admitting the bank statements, D2 will possibly face: (i) numerous claims on breach of solicitor-client privilege; and (ii) an offence under the PDPA (Personal Data Protection Act 2010). D2 and D3 submitted that the bank statements ought not to be admitted as its prejudicial effect far outweighs its probative value (if any).

[33] In *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2016] 5 MLJ 127 at p 137, the Court of Appeal said that s 126 of the Evidence Act

1950 ('the Evidence Act') is the only section that deals with legal professional privilege. A

[34] Section 126(1) of the Evidence Act reads:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any *communication made to him* in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any *document with which he has become acquainted* in the course and for the purpose of his professional employment, or to disclose any *advice given by him to his client* in the course and for the purpose of such employment: B C
>
> Provided that nothing in this section shall protect from disclosure —
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment. D

[35] Section 126 of the Evidence Act protects: (i) communications passing between a solicitor and its client for the purpose of obtaining legal advice; (ii) the contents of any document which the solicitor became acquainted with in course of his employment; and (iii) the advice given by the solicitor to its client. E

[36] In *Tenaga Nasional*, the Court of Appeal observed that the protection of legal professional privilege is of a limited character and is restricted to obtaining legal advice and assistance. The court said at pp 135–136: F

> [126] In this connection, it is also pertinent to refer a passage in *Wheeler v Le Marchant* [1881] 17 Ch D 675 at p 681 where Jessel MR said: G
>
> > In the first place, the *principle protecting confidential communications is of a very limited character.* It does not protect all confidential communications a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary, because without them the ordinary business of life cannot be carried on, still are not privileged ... Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is *restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation* or the rights to property. It has *never gone beyond the obtaining legal advice and assistance*, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that legal advice may be obtained safely and sufficiently. H I

[37] It is my finding that the bank statements are not covered by solicitor-client privilege as they are D2's own internal documents. The bank statements do not constitute communications exchanged between D2 and its clients for the purpose of seeking legal advice. Nor do they constitute advice given by D2 to its clients. The bank statements are not created for the purpose of D2 giving legal advice to its client. They are internal records maintained, in part at any rate, in discharge of D2's obligations under the Solicitors' Account Rules 1990.

[38] Under r 3 of the Solicitors' Account Rules 1990, a solicitor who holds or receives client's money, or money which under r 4 he is permitted and elects to pay into a client account, shall without delay pay such money into a client account. Under r 4 of the Solicitors' Account Rules 1990, trust money may be paid into a client account.

[39] It must be pointed out that the bank statements are essentially ledger entries showing the payments in and payments out from the office account and Client Account of D2. What they show are simply: (i) the date of the payment; (ii) the amount received or paid, as the case may be; (iii) the balance sum in the bank account thereafter; and (iv) a brief description of the payment.

[40] The said brief description merely states the cheque number, fund transfer code or remittance code in respect of the receipts and payments. It does not disclose the name or any details concerning the clients of D2.

[41] It seems to me that the bank statements do not contain any advice or confidential information exchanged between D2 and its clients. I would not treat the bank statements as a solicitor-client communication or a document which contained any privileged information as envisaged or protected by s 126 of the Evidence Act (see *Ernest Cheong Yong Yin v Kamariyah Hamdan & Ors* [2015] 3 MLJevi 40; [2011] 10 CLJ 172). I find that the bank statements are not protected by legal professional privilege.

PERSONAL DATA PROTECTION ACT 2010

[42] It was contended by D2 and D3 that disclosure of the bank statements is an offence under the PDPA. I disagree.

[43] Firstly, I do not think the PDPA applies in respect of the data of D1. As I understand it, the objection taken by D2 and D3 is that the bank statements disclose banking transactions pertaining to D1. So it is D1's banking transaction data that is sought to be prevented from disclosure. As such, the 'data subject' in this case would be D1, being the person who is the subject of the data in question.

[44] However, 'data subject' is defined under s 4 of the PDPA to mean 'an *individual* who is the subject of the personal data'. Obviously D1 is not an individual. It is a corporate entity. For that reason, I do not think the PDPA applies in this case with respect to D1.

[45] Secondly, I recognise though that the bank statements may contain banking transactions pertaining to the other clients of D2 who are individuals. But as pointed out earlier, the bank statements do not disclose the name or any other particulars concerning the clients of D2. Under s 4 of the PDPA, 'personal data' is defined to mean:

> any information in respect of commercial transactions, ... that relates directly or indirectly to a *data subject, who is identified or identifiable from that information* or from that and other information in the possession of a data user ...

[46] It seems to me that the 'data subject', ie the clients of D2, are not identified or identifiable from the ledger entries or information contained in the bank statements. For that reason, I likewise do not think the PDPA applies in this case with respect to the other clients of D2 who are individuals.

[47] Thirdly, even if I am wrong in reaching the aforesaid conclusions, I take the further view that disclosure of the bank statements is permitted under the PDPA itself.

[48] To start with, s 6(1) of the PDPA prohibits a data user from processing personal data about a data subject unless the data subject has given his consent to the processing of the personal data.

[49] The 'data user' in this case would be D2, being the person who processes the personal data. Under s 4 of the PDPA, 'processing' is widely defined to include 'the disclosure of personal data by transmission, transfer, dissemination or otherwise making available'.

[50] However pursuant to s 6(2) of the PDPA, personal data may be processed if the processing is necessary, inter alia, for compliance with any legal obligation to which the data user is subject or for the administration of justice.

[51] Section 6(2) of the PDPA reads:

> (2) Notwithstanding paragraph (1)(a), a data user may process personal data about a data subject if the *processing is necessary* —
>
> ...
>
> (c) for compliance with any *legal obligation to which the data user is the subject*, other than an obligation imposed by a contract;

A ...

(e) for the administration of justice; ...

[52] So for instance, if the court orders a party to give discovery or
B production of certain documents, that party cannot circumvent the court order by hiding behind the PDPA. That party would be under a legal obligation to provide the documents, in compliance with the court order for discovery of the documents. Or else risk being found to be in contempt of court.

C **[53]** I am aware that O 24 r 5(2) of the RoC contemplates a possible scenario where a document may be privileged from production. And that under O 24 r 15 of the RoC, the rules regarding discovery of documents are subject to any written law or any rule of law which authorizes or requires the withholding of any document on the ground that the disclosure of it would be injurious to the
D public interest.

[54] In this instance however, the PDPA itself permits disclosure of documents if necessary for compliance with any legal obligation to which the
E data user is subject or for the administration of justice. Furthermore, the PDPA grants an exemption in favour of disclosure of personal data that is necessary for the purpose of any court order or judgment.

[55] This is stipulated in s 45(2)(d) of the PDPA which reads:

F (2) Subject to section 46, personal data —

(d) that is necessary for the purpose of or in connection with any *order or judgment of a court* shall be *exempted* from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act;

G

[56] So where the court makes a ruling that the documents in question are relevant and admissible (as is the case here), a party cannot use the PDPA as a shield to prevent the said documents from being produced at the trial under the guise of personal data protection.

H

[57] In my opinion, making available the bank statements as evidence in the trial would be permitted under the PDPA as it is necessary for the administration of justice. It would be against the interests of justice if the bank statements were prevented from being admitted as evidence at the trial due to
I reasons of personal data protection.

[58] In any event, the aforesaid exemption contained in s 45(2)(d) of the PDPA clearly permits disclosure of documents that is necessary pursuant to a court order or judgment. As such, the disclosure of the bank statements is

permitted given my ruling that the bank statements are relevant and admissible.

[59] Fourthly, it is noteworthy that the bank statements were already tendered as evidence at the criminal trial of D3 in the sessions court. And that the bank statements were provided by the sessions court to P's solicitors upon request.

[60] Lastly, I should say that I was taken to no authority dealing with this issue concerning the PDPA by D2 and D3. Nor did I have the benefit of P's submission on this question. My analysis above is based on my interpretation of the salient provisions of the PDPA.

WHETHER RES JUDICATA APPLIES

[61] D2 and D3 contends that Pis estopped from attempting to tender the bank statements again as it is barred by res judicata. The reason being that the former HCJ had dismissed P's discovery application of the bank statements. In so doing, the former HCJ has decided that the bank statements are not relevant or necessary for the determination of a fact in issue.

[62] In his grounds of judgment dated 25 August 2017, the former HCJ held that P's discovery application was dismissed on the grounds of delay alone. But for completeness, the former HCJ proceeded to consider the merits of the discovery application as well. The former HCJ said:

> 61. Thus, on the *grounds of delay alone*, I am constrained to dismiss the discovery application (Enclosure 139). But, for completeness, I will proceed to consider the merits of the discovery application as well.
>
> ...
>
> 65. Thus, having considered the affidavits of the parties and the submission of counsel, I am plainly unconvinced that the documents which are sought in the discovery application are *relevant or necessary* for the determination of a fact in issue and generally for the expeditious disposal of the suit.

[63] On the other side of the equation however, there is the decision of the subsequent HCJ. The subsequent HCJ had dismissed the defendants' application to expunge the bank statements from the documents that P intends to rely on for the trial of the instant suit. In his grounds of judgment dated 29 October 2019 at pp 11–12, the subsequent HCJ dealt with the decision of the former HCJ in the following fashion:

> The court has read the ground of decision of the trial judge in dismissing encl 139 but the dismissal of the application was due to an inordinate delay. However, the learned judge did discuss the merits of encl 139 for the sake of completeness.

Therefore the court was of the view that the decision in respect of the discovery application in encl 139 is not binding on this court as it was made *obiter dicta* and the *rule of resjudicata does not apply*. In the same vein the GOA in affirming the HC decision also did not provide any ground of judgment.

[64] As an aside, the instant suit was previously before the former HCJ before it was transferred to the subsequent HCJ. It was then transferred to me.

[65] I am faced with two apparently conflicting High Court decisions which were made in this very same action. To add to the dilemma, D2 and D3 cited a related case of *How Chee Hong v Chong Joo Tian & Ors* [2019] MLJU 437; [2019] 9 CLJ 383 to support their argument that the bank statements are privileged information.

[66] The brief facts of *How Chee Hong* are these. The complainant had lodged a disciplinary complaint against D3 with the Advocates and Solicitors Disciplinary Board relating to the land transaction. The complainant is a director of P ('P director'). On 26 February 2017, the Disciplinary Committee allowed P director's application for production of documents against D3, which include the bank statements. On 6 September 2017, D3 filed an Originating Summons No WA-17D-26–09 of 2017 at the Kuala Lumpur High Court seeking an order that the documents directed to be produced by the Disciplinary Committee are protected by solicitor-client privilege ('OS 26').

[67] In OS 26, the learned High Court judge, Justice Dato' Nordin bin Hassan (now JCA) ('OS HCJ') held that the documents in question are privileged communication under s 126(1) of the Evidence Act. According to P, this decision in OS 26 is currently pending appeal by the Disciplinary Board and three others at the Court of Appeal.

[68] Although I am not bound by the decisions of other High Court judges, I would certainly give deference to the decisions of the subsequent HCJ, the former HCJ and the OS HCJ as referred to above. They are strongly persuasive and should be followed where applicable.

Decision in OS 26

[69] With respect to the decision of the OS HCJ however, I find that it is distinguishable from the present case. As explained earlier, my finding is that the bank statements are not covered by solicitor-client privilege. The OS HCJ thought otherwise. I would distinguish that decision for the following reasons.

[70] First, the documents which were under consideration in OS 26 were

much wider. They were not confined to the bank statements alone. The documents in question also encompass cheques, payment vouchers, letters and all other documents pertaining to dealings with the deposit monies. This is evident from the following passage at p 392 of *How Chee Hong*:

> [30] In this case, the documents ordered to be produced by the plaintiff are all documents relating to cheques, payment vouchers, bank statements, *letter and other document* showing the holding, releasing, payment and dealing with the deposit sum of RM9,056,124 paid to the plaintiff's firm as stakeholder for Zenith Delight Sdn Bhd.

[71] Second, P here was not a party to OS 26. There is authority for the proposition that res judicata does not apply against one who was not a party in the prior proceedings which resulted in a final judgment. In *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654 at p 666, the Court of Appeal said:

> Whatever it is res judicata can never be applied in favour of the defendants because *res judicata only prohibits a cause of action from being re-litigated between the same parties but in that case the defendants were never a party*. And in *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* although the defendants were a party, res judicata, whether in the narrow sense or the wider sense, cannot apply because the matter involved in the case is in respect of an interlocutory order relating to injunctions. It is trite law that *for res judicata to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties or finally puts the case out of court.*

[72] In OS 26, the P director attempted to intervene by filing an intervener application in the High Court on 3 October 2017 ('intervener application') as he was the complainant for the disciplinary hearing contested in OS 26. But the intervener application was dismissed by the High Court on 23 November 2017. On appeal, the Court of Appeal likewise dismissed the intervener application on 14 March 2018. The party who opposed the intervener application was D3.

[73] Since P director was denied an opportunity to intervene and put forward his case in OS 26 as to whether the bank statements are protected by solicitor-client privilege, my view is that res judicata does not operate to shut out P from litigating this issue in the instant action.

[74] Third, res judicata is a doctrine of substantial justice. Since the doctrine is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. I am guided by the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 which said:

> Now, *res judicata is not merely a technical rule of pleading*. It is a *doctrine of substantial*

> *justice.* It is a process whereby justice is achieved procedurally by precluding a party from reagitating in subsequent proceedings a complaint or an issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena.
>
> ...
>
> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. *Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.* And there is respectable authority in support of the view I have just expressed.
>
> ...
>
> On the authorities discussed thus far, the principle comes to this. Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be *determined on the facts of each* case, always having regard to *where the justice of the individual and particular case lies.*

[75] Here, my opinion is that the justice of the instant case lies in favour of admissibility of the bank statements on the footing that they are not covered by legal professional privilege.

Decisions of the former HCJ and the subsequent HCJ

[76] At the hearing of the appeal against the decision of the subsequent HCJ, the Court of Appeal recorded the consent order on the following terms. The bank statements are to be categorised as Part C documents. Parties are at liberty to argue on the admissibility of the bank statements. I believe this gives me the liberty to decide afresh the question of whether the bank statements are relevant and admissible.

[77] Moreover, the former HCJ was dealing with the issue of relevancy and necessity for the purposes of a discovery application made under O 24 of the RoC. That was an interlocutory application which was decided based on affidavit evidence. It was not a determination of relevancy and admissibility under the Evidence Act for the purposes of a trial.

[78] The relevancy of documents for a trial is governed by s 5 of the Evidence Act. It states:

> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[79] With regards to documentary evidence, the contents of documents may be proved either by primary or by secondary evidence (see s 61 and Chapter V

of the Evidence Act).

[80] Clearly, the former HCJ was not dealing with the question of the relevancy and admissibility of the bank statements under the Evidence Act in the context of a trial. Contrariwise, I was tasked to determine the admissibility of the bank statements at the trial pursuant to the consent order.

[81] It follows that the decision of the former HCJ cannot be res judicata for the purposes of determining the question as to whether the bank statements are relevant and admissible in a trial pursuant to the Evidence Act. This is a matter that must be determined at the trial by the trial judge.

CONCLUSION

[82] For the reasons above, I allowed P's application to admit the bank statements as evidence at the trial of this suit.

Application allowed.

Reported by Mohd Kamarul Anwar